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## NOTES.

CARRIERS—JURISDICTION—DISCRIMINATION IN THE SUPPLY OF CARS—The United States Supreme Court has recently handed down two opinions relating to the subject of discrimination by a carrier in its distribution of cars.[1] In the light of previous decisions and the doctrine of the Abilene case,[2] giving the Interstate Commerce Commission jurisdiction in case of alleged unreasonableness of rates, these opinions are of interest at least to the student and of possible regret to those who have been following with satisfaction the tending of the Supreme Court to extend rather than to limit the powers of the Commission in dealing with railroad problems generally.

In 1902, at the time of the anthracite coal strike, there came a sudden demand for cars for the bituminous mines along the Pennsylvania Railroad.[3] At this time the railroad governed its car dis-

[1] Penna. R. R. v. Puritan Coal Mining Co., 35 S. C. R. 484 (April, 1915); Eastern Ry. Co. of New Mexico v. Littlefield, 35 S. C. R. 489 (April, 1915).

[2] Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426 (1901).

[3] Discussion deals with the Puritan Coal Co. case only. The Eastern Ry.

tribution by a schedule predicated upon the output of the various mines. When this great demand for cars came the railroad ceased to abide by this schedule and, according to the allegations of the Puritan Coal Mining Company, failed to supply it with the number of cars that according to the railroad's own schedule it should have had. Moreover, it was alleged that other mines received a greater number than they were entitled to under the schedule. The Puritan Coal Mining Company sued in the county court for damages for unlawful discrimination extending over a period of several years. Recovery was allowed and this was affirmed by the Supreme Court of Pennsylvania.[4] This judgment the Supreme Court of the United States has now sustained. In substance the court holds "that the Puritan Company was entitled to recover because of the fact that the carrier failed to comply with its common law liability to furnish it with a proper number of cars". What was the proper number was a question of fact and the determination of this, the court said, came properly within the jurisdiction of the State court. In support of the alleged discrimination the plaintiff relied on the railroad's own schedule as evidence.

Section Three of the Interstate Commerce Act makes it unlawful for a carrier to give undue preference to one shipper over another.[5] Section Eight gives a right of action against the carrier for the doing of anything prohibited by the Act.[6] Section Nine then provides that any person alleging damage by a carrier subject to the Act may make complaint before the Commission or may bring suit for damages in any federal court of competent jurisdiction.[7] This last section would appear to restrict all complaints relative to

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of New Mexico case was decided directly on the authority of the Puritan case and on substantially the same facts.

[4] 237 Pa. 420 (1912).

[5] Sect. 3: "It shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

[6] Sect. 8: "That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured for the full amount of damages sustained in consequence of any such violation of the provisions of this act. . . ."

[7] Sect. 9: "That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; . . ."

interstate commerce to adjudication before the Commission or in the federal courts. To avoid this, Section Twenty-two provides that "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies". Relying on this common law obligation and also on the statute of Pennsylvania [8] forbidding unreasonable discrimination, both of which were reserved to the shipper by Section Twenty-two, the Puritan Company sued in the State court and recovered.

The leading case to affirmatively establish the extensive powers of the Interstate Commerce Commission is the Abilene Oil Company case.[9] In that case the railroad had filed its rates with the Commission. The plaintiff, relying on Section Twenty-two of the Act, sought the State court's jurisdiction to declare certain rates unreasonable. But the Supreme Court of the United States held that notwithstanding this section no State court could declare unreasonable rates which had been filed with the Commission and which had not been declared unreasonable by that body. The same principle was applied in *Robinson* v. *Baltimore & Ohio Railroad,*[10] the only difference being that in that case discrimination rather than unreasonableness was alleged. In both cases the carriers had strictly observed the filed and published tariffs and were held exempt from the common law liability which appeared to exist under Section Twenty-two of the Act. The court said that a strict observance of that section would defeat the very purpose of the Act which had provided for an expert commission to decide upon discrimination and unreasonableness. Following the principle of the Abilene case it was held in the Pitcairn case [11] that the United States Circuit Court could not issue a writ of mandamus, as provided for by Section Twenty-three of the Act, compelling a railroad to put into effect a schedule of car distribution which it, the Circuit Court, thought proper and non-discriminatory.[12] What was a proper method was for the Commission and complaint must be made there and the Commission must have found it discriminatory or unreasonable before any court could act.

In *Morrisdale Coal Company* v. *Pennsylvania Railroad* [13] it would appear that the Supreme Court had even extended this previous doctrine of the Abilene and Pitcairn case, and it is with this case that we find it difficult to reconcile our two principal cases. Here the railroad had its own schedule for car distribution but this schedule was not filed with the Commission. Suit was brought in

[8] Act June 4, 1883, P. L. 72.

[9] *Supra,* note 2.

[10] 223 U. S. 506 (1912).

[11] B. & O. R. R. v. Pitcairn Coal Co., 215 U. S. 481 (1910).

[12] See also I. C. C. v. Ill. Central R. R., 215 U. S. 452 (1910).

[13] 230 U. S. 304 (1913).

the Circuit Court under Section Nine [14] of the Act to recover damages for violation of Section Three.[15] The railroad in this case had observed its schedule but the plaintiff contended that the schedule was discriminatory. As in the Pitcairn case, the Supreme Court held that the Circuit Court could not put into effect for future conduct such rules of car distribution as it, the Circuit Court, thought non-discriminatory, so in the Morrisdale case the court said that the Circuit Court could not award damages which had resulted from the enforcement of a rule that the Circuit Court considered discriminatory. Again the court said that it was for the Interstate Commerce Commission to say whether or not such rule was discriminatory or not. But now come our principal cases and with these leading decisions to go by, each apparently increasing the power of the Commission in the matter of determining what is discriminatory, the Supreme Court holds flatly that the State court had jurisdiction under Section Twenty-two of the Act. In the Puritan case, as in the Morrisdale case, the railroad had a schedule for car distribution, and as in that case also such schedule was not filed with the Commission. "But," said the court, ". . . there are two forms of discrimination—one in the rule and the other in the manner of its enforcement." In the Morrisdale case the schedule itself was attacked as unreasonable and the court said that that question was for the Commission to decide. In the Puritan case the schedule was not attacked as unreasonable; rather it was alleged and proven that the railroad had distributed according to its schedule. This is what was meant by the two kinds of discrimination. This distinction is made the basis of the court's opinion. Is it a real distinction? After stating how the two cases differ the court says: "The plaintiff alleged it was damaged by reason of the carrier's failure to furnish it with cars to which it was entitled." The court held that this allegation gave rise to a good cause of action in the State court and that the coal company was there entitled to prove the facts alleged. But to what number of cars was the plaintiff entitled? How can it be said that "on the trial there was no administrative question as to the reasonableness of the rule but only a claim for damages occasioned by its violation in failing to furnish cars"? Did the fact that the railroad itself had fixed the rule (schedule) make that such a rule that any deviation therefrom would amount to discrimination? So the court seemed to say. Yet as a matter of fact the Interstate Commerce Commission later declared this very schedule discriminatory.[16] In spite of this the State court was allowed to award damages for failure to abide by this rule—later declared discriminatory.[17]

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[14] *Supra,* note 7.

[15] *Supra,* note 5.

[16] Hillsdale Coal & Coke Co. v. Penna. R. R., 19 I. C. C. Rep. 356 (1910).

[17] It is admitted that the question raised in our principal case was reserved in the Morrisdale Case (*supra,* note 13), at page 314.

Through all these cases it has been said that "the question as to the reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission". Is it less administrative in its character when damages are being sought for a failure to abide by a purely railroad-made rule which had not been filed? Allowing such recovery is doing one of two things. It is either allowing a State court to determine what is a proper rule without the previous judgment of the Commission, or it is saying that the mere fact that a railroad has a schedule is proof that such schedule is non-discriminatory. The former is certainly against the principle laid down in the Abilene, Robinson and Pitcairn cases. The latter, in view of the later finding by the Commission that the rule was of itself discriminatory, seems unwise to say the least.

One is tempted to believe that the court may have been influenced by Mr. Justice Pitney's dissent in the Morrisdale case [18] and in two other cases decided at that same time.[19] His idea was that these three decisions were unnecessarily eliminating the force of Section Nine of the Act which allowed the United States courts jurisdiction. He argued that the opinion in the Abilene case is logical: That where it is a question of laying out schedules for *future* observance it is entirely proper to make the ruling of the Commission supreme and to deny to any court the right to say that such is unreasonable or discriminatory. "But to so apply that reasoning as to make it support the contention that discriminations by the carrier in the *past,* amounting to a *departure by the carrier from the established schedule* . . . and where the conduct of the carrier has no *prima facie* sanction under the law by reason of the filing and publishing of a schedule or otherwise, shall not be actionable in the ordinary course of law without previous investigation or determination by the Commission is not only to ignore the essential differences between the facts in this case [20] and those in the Abilene case, but is to *virtually eliminate Section Nine of the Interstate Commerce Act.* . . ."[21] It is suggested that this language may have had some bearing on the present decisions.

*H. I.*

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CONSTITUTIONAL LAW—INTERSTATE COMMERCE—WEBB-KENYON ACT—The history of the development, both by judicial decision and by legislation, of the States' power to control the sale of liquor

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[18] 230 U. S. at page 267.

[19] Penna. R. R. Co. v. International Coal Co., 230 U. S. 184 (1913); Mitchell Coal & Coke Co. v. Penna. R. R. Co., 230 U. S. 247 (1913).

[20] Mitchell Coal Co. Case, *supra,* note 19; Morrisdale Coal Co. Case, *supra,* note 13.

[21] 230 U. S. at page 296.